No. 14540

In the United States Court of Appeals for the Ninth Circuit

BOEING AIRPLANE COMPANY, A CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION FOR REVIEW AND ON REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

DAVID P. FINDLING,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

FREDERICK U. REEL,
NANCY M. SHERMAN,
Attorneys,
National Labor Relations Board.

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In the United States Court of Appeals for the Ninth Circuit

No. 14540

Boeing Airplane Company, a Corporation, petitioner

v.

National Labor Relations Board, respondent

ON PETITION FOR REVIEW AND ON REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of Boeing Airplane Company to review and set aside a portion of an order of the National Labor Relations Board (R. 143–145, 148–150)[1] issued against petitioner on September 30, 1954, following the usual proceedings under Section 10 (c) of the National Labor Relations Act (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*).[2] In its answer (R. 162–164) the Board has requested enforcement of its order. This Court

[1] References to portions of the printed record are designated "R." References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

[2] The pertinent statutory provisions are reprinted as an Appendix at pp. 22–25, *infra*.

has jurisdiction under Section 10 (e) and (f) of the Act, the unfair labor practice having occurred at Seattle, Washington, within this judicial circuit.[3] The Board's decision and order are reported at 110 N. L. R. B. No. 22.

COUNTERSTATEMENT OF THE CASE

I. The Board's Findings of Fact and Conclusions of Law

Briefly, the Board found that the Company violated Section 8 (a) (1) and (3) of the Act by discharging employee Charles Robert Pearson because of his efforts on behalf of the Seattle Professional Engineering Employees Association, herein called the Union, in organizing the Manpower Availability Conference, whose nature is explained in detail on pp. 3–5, *infra*. The facts, which are virtually undisputed but are not fully stated in the Company's brief, are summarized below.

A. The Company and the Union bargain to an impasse concerning wages

Since 1946, the Union has represented a unit of employees in the Company's Engineering Division under a series of collective bargaining agreements (R. 27; 386–387). Beginning in April 1952, the Company and the Union participated in a number of bargaining meetings in an effort to agree upon a contract to replace the one which was about to expire (R. 27–30, 131; 268–269, 287–294). The negotiations con-

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[3] Petitioner, Boeing Airplane Company, is a Delaware corporation which manufactures aircraft and aircraft parts. Its operations in the State of Washington involve substantial shipments to and from points outside Washington. No jurisdictional issue is presented (R. 26; 7, 14).

tinued after the expiration of this contract, about August 21, but the parties were unable to reach a new agreement (R. 29–30, 131; 293, 387–388, 393, 526–527). A major subject of controversy was wage rates; the Union finally took the position that the employees should receive a 13.5 percent increase, while the Company offered only a 6 percent increase (R. 28–29, 131; 288–289, 311–312, 314–316, 393, 524).

B. The Union attempts to organize a Manpower Availability Conference

1. The nature and purposes of the Manpower Availability Conference

The Union believed that its position in bargaining with the Company was appreciably weakened by a "Gentlemen's Agreement" between the Company and other aircraft manufacturers that none of them would hire any engineer employed by any of the others without the consent of his present employer (R. 132; 303, 307, 355–356, 359, 366–368, 433–435, 503–511). The Union had been unable to induce the Company to abandon this "Gentlemen's Agreement" (R. 308–309). When the Union found itself unable to obtain a satisfactory wage increase through the negotiating process, the Union's Action Committee, whose function was to consider plans to strengthen the Union's bargaining position, made a report to a union membership meeting suggesting that the Union organize a "Manpower Availability Conference" (herein called the MAC or the Conference) whose nature is described below (R. 31–32; 258–259, 368–369).[4] The members

[4] The Company contends that several other types of pressure suggested by the Action Committee, if adopted, would have constituted unprotected activity. This contention is obviously immaterial, since these recommendations were never approved either

attending the meeting approved the suggestion and instructed the Executive Committee to distribute copies of the report to the membership (R. 31–32; 259–263). The Executive Committee mailed a copy of the report to each member of the Union, together with a questionnaire as to his views on the proposal (R. 31–32; 209, 262, 477–482). About 40 percent of the membership filled out the questionnaire, and about 97 percent of them either favored the proposal or expressed no objection thereto (R. 35–36; 209–212). The scheme suggested in the report may be summarized as follows:

The MAC was conceived as a "market place" where engineers presently employed by the Company could meet with other employers and possibly obtain offers of more desirable employment (R. 32, 132; 209, 477). By using personal data submitted to the Union by participants in the MAC, the Union was to obtain the names of other employers interested in hiring engineers presently employed by the Company (R. 33; 209, 478). The Union was to arrange for a series of conferences at which employee participants in the MAC might meet with the prospective employers located by the Union (*id.*). The employees interviewed were to inform the Union of any differential between their present salaries and those offered by prospective employers (*id.*).

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by the Executive Committee, which is responsible for effectuating union policy (R. 256), or by the Union itself (R. 334–335, 346, 261–262, see 477–482), and none of the allegedly unlawful suggestions was ever put into effect (R. 370–372). The Action Committee was a planning committee only (R. 331).

The Union hoped that this plan, if successful, would (1) put pressure on the Company to offer additional salary increases in the belief that, if it did not, many of its present engineers would quit; (2) help the Union to discover the "true market price for Engineers," particularly in view of the effect of the "Gentlemen's Agreement" (see p. 3, *supra*); and (3) help engineers desiring to leave the Company's employ to obtain the best competitive offer (R. 32–33, 132; 209, 265–267, 366, 477–478).

2. Pearson's participation in the MAC

Prior to receiving the returned questionnaires, the Executive Committee appointed a special Manpower Availability Conference Committee (herein called the MAC Committee) to plan and initiate the conference (R. 36; 195). Charles Robert Pearson, an engineering designer employed by the Company, was named as chairman of the MAC Committee (*id.*). On the basis of the response to the questionnaires, the Union informed the Company that more than 500 engineers were willing to attend the Conference, but the Company submitted a final wage offer substantially less than the Union's final demand (R. 288–289, 293–294, 311–312, 314–316, 393, 524). The Executive Committee then instructed Pearson to obtain a local city license to conduct an employment agency (R. 43; 201–202, 369).[5] Pearson obtained this license in January

[5] The MAC Committee felt that such a license was unnecessary, but decided to obtain the license to remove any possible doubt as to the legality of the MAC (R. 43; 200–201). The license was issued in Pearson's name, since the Union, being neither a person, a partnership, nor a corporation, was not qualified under the applicable city ordinance to obtain a license in its own name (R. 202).

1953 (R. 43; 202). At about the same time, the MAC Committee, headed by Pearson, drafted a letter of invitation to the Conference, to be sent to about 2,800 employers of engineers throughout the country, whose names had been compiled and submitted to him by a subcommittee of the MAC Committee (R. 43, 132; 486–489, 197). The Executive Committee approved this letter, and it was sent out under the Union's letterhead and over a facsimile of Pearson's signature (R. 43, 132, 112–115; 218–219, 221, 486–491). A copy of this letter was sent to A. F. Logan, the Company's vice president in charge of industrial relations, with a covering letter signed by the chairman of the Union's Executive Committee (R. 43, 133; 225, 493–494). The letter to the Company asserted that the Union was conducting the conference "to obtain data on the true market value of engineers with various amounts of experience" and "to provide members with improved opportunities to bargain for their services" (R. 43–44, 133; 225, 493). The letter stated, "Our membership has requested [the Union] to restore the freedom and privacy of engineers who seek to improve their situations by changing employers" (R. 44; 225, 493).[6]

3. The discharge of employee Pearson because of his activity in connection with the MAC

Immediately upon reading the material forwarded to him by the Union, Company Vice President Logan

[6] Almost 90 percent of the engineers indicating on their questionnaires that they desired to leave the Company's employ had asserted that they wished not to disclose their intention to the Company (R. 35; 210–212).

recalled Pearson from a tour of duty out of town and summoned him to Logan's office (R. 45; 225). In response to a direct inquiry, Pearson admitted that the facsimile signature on the letter was his own (R. 45; 226, 232, 494). However, he refused to answer Logan's repeated inquiries as to whether he was a "licensed and bonded employment agent" in the absence of "appropriate members" of the Union, on the ground that the matter directly concerned his activities on behalf of the Union (R. 45–47; 232, 410–411, 494–496). Logan concluded the interview by stating (R. 47–48; 232, 497–498):

> We will * * * make the decision that your work as an employee at Boeing would be entirely too greatly impaired by your outside activities as an employment agent, and we are therefore unwilling to permit you to continue such activities and remain in our employ.

Pearson observed in reply (R. 48; 232, 398):

> Whereas the timing of this action is definitely connected with our release of the manpower availability conference invitations in behalf of the [Union], this action can only be interpreted as being a retaliatory action against the [Union] and discrimination against me personally and retaliation against my legitimate union activities.

Pearson later received a termination notice from the Company attributing his discharge to "Refusal to answer questions relative to outside activities as employment agent" (R. 48; 234, 499–500).

During subsequent negotiations between the Company and the Union concerning Pearson's discharge,

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the Company by letter informed Pearson that he had been discharged because the Company felt that the MAC would cause a number of engineers to leave the Company's employ and would also lessen the Company's ability to obtain new engineers, "resulting in serious damage to the Company" (R. 50–52; 236, 393, 500–503, 541–544).

Early in February, the Union informed the Company that it was abandoning the MAC owing to insufficient interest on the part of prospective employers (R. 53, 134; 402). By letter dated March 2, pursuant to the Union's request, the Company offered to reinstate Pearson, noting, however, that the MAC had been unsuccessful and its revival was not anticipated (R. 53–54; 322–323, 514). Pearson accepted the offer and has been working for the Company since March 17, 1953 (R. 54; 134; 237).

C. The Board's conclusions

The Board concluded that, as the Company admitted in its answer (R. 15–16), the Company discharged Pearson because of his activities in connection with the MAC (R. 133). The Board, Members Beeson and Rodgers dissenting, found that the MAC constituted a union and concerted activity protected by Section 7 of the Act, and that therefore Pearson's discharge for participating therein violated Section 8 (a) (1) and (3) of the Act (R. 131–140).

II. The Board's Order

The Board's order (R. 143–145, 148–150) requires the Company to cease and desist from discouraging membership in any labor organization by discriminat-

ing against its employees, or from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their organizational rights. Affirmatively, the Company is required to make Pearson whole for any loss of pay he may have suffered by reason of the discrimination against him, and to post appropriate notices.

SUMMARY OF ARGUMENT

The MAC was admittedly union activity or concerted activity within the literal language of Section 7. The issue is whether it was such improper activity as to fall outside the protection of that Section.

When the Company refused to meet the Union's wage demands, the Union in effect said to the employees, "Our efforts to get you a satisfactory wage having failed, we will put those who wish to change jobs in touch with other employers." This in essence was the MAC. It was not misconduct, invasion of property or contract rights, violation of law, or disparagement of the employer's product—all of which may be unprotected concerted activities. It was, on the contrary, an attempt to restore fair competition for labor, and it "harmed" the Company only by exposing it to the hazards which it would encounter if it paid lower wages than other employers of engineers.

Since the MAC existed for lawful union purposes and did not invade the Company's rights, it fell within the spirit as well as within the letter of Section 7, and a discharge for MAC activity therefore violated the Act.

ARGUMENT

The Board properly concluded that the activity for which the Company discharged Pearson was protected by the Act

A. Introduction—the issue defined

Since petitioner concedes that it discharged Pearson because of his activity in the MAC, this case presents a single narrow issue: was the MAC a union or concerted activity protected by Section 7 of the Act.[7] Moreover, since the MAC was concededly a union activity undertaken by the employees acting in concert, Pearson's activity manifestly fell within the literal language of Section 7. We agree with petitioner, however, that not all "concerted" or "union" activity is protected by Section 7. The issue in this case, therefore, reduces to this question: did the Board correctly conclude that the conduct in this case was not so improper as to forfeit the protection which Section 7 presumptively affords to concerted activity? We shall show that the MAC fell within the spirit as well as within the letter of Section 7, and that it did not contain the elements which have led the courts to deny protection to certain concerted activities.

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[7] The subsidiary issues raised in the Company's brief as to "refusal to bargain" (Br., pp. 40–44) and discharge for "cause" (Br., pp. 44–47) are not, on proper analysis, separate from the main question. If, as we contend, Pearson's activity was protected by Section 7, it did not constitute an unlawful refusal to bargain and his discharge for engaging therein was not for "cause." If, on the other hand, Pearson's activity was not so protected, it is unnecessary to decide whether it involved his union in a violation of Section 8 (b) (3), for it is well settled that an employer may discharge an employee for any reason other than for engaging in an activity protected by the Act.

B. The MAC did not fall within the class of "improper" concerted activities which have no statutory protection

The Company, conceding as it must that the MAC was a concerted or union activity, contends that the activity was "unlawful," "illegal," "improper," "indefensible," and "disloyal" within the meaning of the decisions holding that such activity forfeits the protection otherwise extended by the statute. The Company urges that those are "broad terms," that "the decisions have suggested no particular limitation to their scope" and that "each of these terms applies" to the MAC (Brief, p. 26). Before discussing the cases on which the Company relies, it would seem appropriate to restate just what this "illegal, disloyal, indefensible, etc." conduct was:

The Union had vainly sought a satisfactory wage increase. Confronted with the Company's firm refusal, the Union in effect said to the employees, "We cannot obtain a satisfactory wage increase. We suggest that those who care to do so try to obtain better jobs elsewhere. We know you are hampered by the 'Gentlemen's Agreement,' but we will help put you in touch with other employers." This is the conduct which petitioner characterizes as "illegal, disloyal, unlawful, improper, and indefensible."

The cases cited by petitioner at page 25 of its brief represent a fair sampling of the type of concerted activity from which the courts and the Board have withheld statutory protection. The leading decision is the *Fansteel* case [8] where an unlawful violent sitdown strike was held outside the protection of the

[8] *N. L. R. B.* v. *Fansteel Metallurgical Co.*, 306 U. S. 240.

Act. Similar rulings have been repeatedly made where employees engaged in violence, committed actionable wrongs such as breach of contract, or otherwise invaded property rights or personal rights. Manifestly this line of decisions has no bearing on the peaceful, lawful action involved in this case.[9] Petitioner places particular reliance, however, on five cases[10] in which the concerted activity held unprotected did not involve an actionable wrong, and to those cases we now turn.[11]

The inapplicability of the *Conn* and *Ward* cases appears from the very excerpts quoted by the Company. In *Conn* the employees in defiance of instructions refused to work certain overtime hours, and in *Ward* they refused to work on certain materials. In

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[9] Even treating the MAC as an attempt to induce the employees to quit, this is not a tort since the employees' contracts of employment were terminable at will. *Porter* v. *King County Medical Society*, 58 P. 2d 367, 370, 186 Wash. 410. Furthermore, the conduct was legally justified since it was motivated by a desire to improve wages. *Imperial Ice Co.* v. *Rossier*, 112 P. 2d 631, 632–633, 18 Cal. 2d 814.

[10] *N. L. R. B.* v. *Local Union No. 1229*, 346 U. S. 464 (referred to by the Company and hereinafter as the "*Jefferson Standard*" case);

International Union UAW v. *Wisconsin Employment Rel. Bd.*, 336 U. S. 245 (hereinafter "*Wisconsin*" case);

N. L. R. B. v. *Montgomery Ward & Co.*, 157 F. 2d 486 (C. A. 8) (hereinafter "*Ward*" case);

C. G. Conn, Ltd. v. *N. L. R. B.*, 108 F. 2d 390 (C. A. 7) (hereinafter "*Conn*" case);

Hoover Co. v. *N. L. R. B.*, 191 F. 2d 380 (C. A. 6) (hereinafter "*Hoover*" case).

[11] This is not to say that "every law violation * * * by striking employees brings their status within * * * *Fansteel* * * *." *N. L. R. B.* v. *Cambria Clay Products Co.*, 215 F. 2d 48, 54 (C. A. 6).

both cases the refusal of the employees to do the directed work was analogous to a sitdown or slowdown, crippling the employer's production. In the instant case there is no suggestion that the employees failed to perform any task petitioner assigned them, or that the MAC adversely affected production.

The *Wisconsin* case is quoted at petitioner's brief, pp. 27–28, for the freely conceded proposition that "illegal action is [not] made legal by concert." In that case the employees engaged in 26 "surprise" walkouts, for no stated demands, within five months. The Supreme Court, noting that the employer had not discharged the employees for this conduct, sustained the view of the state labor board that this activity was "similar to the sit-down strike * * * and to * * * labor violence." See *U. A. W.* v. *O'Brien,* 339 U. S. 454, 459, explaining the *Wisconsin* decision.

Both the *Hoover* and the *Jefferson Standard* cases involved action by the employees designed to destroy their employer's market. In *Jefferson Standard* the employees circulated handbills attacking the quality of their employer's services, and in *Hoover* the employees requested potential customers to boycott the employer's product.[12] Thus in *Hoover,* the Sixth Circuit recognized that "of course, an employee can engage in 'concerted action for mutual aid and protection' even though it may be highly prejudicial to

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[12] The actual holding in *Hoover* was that the boycott was incidental to a strike which was inherently unlawful. See the discussion of the case in *N. L. R. B.* v. *Electronics Equipment Co.*, 194 F. 2d 650 (C. A. 2).

his employer, and results in his customers' refusal to deal with him, just *so long as such activity is not a wrong done to the company.*" (191 F. 2d at 390). [Emphasis supplied.] But, the court added (*ibid.*):

> It is a wrong done to the company for employees, while being employed and paid wages by a company, to engage in a boycott to prevent others from purchasing what their employer is engaged in selling and which is the very thing their employer is paying them to produce. An employer is not required, under the Act, to finance a boycott against himself.

Similarly in *Jefferson Standard* the "disloyalty" condemned by the Supreme Court was a public disparagement of the commodity the employer sold. Moreover, in the latter case the Supreme Court emphasized that the antiemployer literature was totally unrelated to the labor dispute.

Manifestly the conduct of the employees in the instant case is a far cry from the boycotting and disparagement of product involved in the cases relied on. Here the employees were exercising nothing more than their right to obtain better employment, either from Boeing or from other employers. Cf. *Pollock* v. *Williams,* 322 U. S. 4, 18, where the Supreme Court observed that "the defense against oppressive hours, pay, working conditions or treatment is the right to change employers." If any harm was visited on the employer here, it was not because the employees attacked his product or interfered with his selling; *it was solely because he was not meeting the competition of other employers in the labor market.*

Petitioner purports to find in the cases it relies on an underlying principle that employees cannot engage in concerted activity potentially harmful to the employer's economic interests while continuing to draw pay from him. We submit that analysis of the decisions reveals the falsity of this proposed touchstone. In the first place, the entire line of decisions stems from the *Fansteel* case, where the employees had in fact gone on strike, but were nonetheless held outside the protection of the Act because of their invasion of the employer's property rights. The fundamental test in the "misconduct" cases is not whether the employees are continuing to draw pay but whether their misconduct is of a violent or otherwise serious character. Conversely, the attack on the employer's product in *Jefferson Standard* would have been grounds for discharge even had the employees who participated in the attack been on strike at the time. Moreover, petitioner's "touchstone" proves too much, for concerted activity is normally protected by the statute whether or not the employees engaging therein have gone on strike. Perhaps the most typical example is pre-strike activity itself. Obviously the statutory protection extends to employees who, while still drawing pay, urge that they and their fellow employees should go on strike. Similarly, organization of a union raises a threat of potential harm to the employer's economic interest, but an employer could not lawfully discharge an employee for lawful organizing activity merely because the employee did not go on strike while conduct-

ing his campaign.[13] In short, the "touchstone" for determining whether concerted activity is outside the protection of the Act is to be found not in whether the persons engaged therein are drawing wages from the employer nor in whether the activity may result in economic harm to the employer, but in whether the activity results in an invasion of the employer's rights in a manner unrelated to the legitimate objectives of employee concerted activity—e. g., violent conduct, destruction of property, refusal to perform assigned tasks, disparagement of employer's product.[14] As Judge Learned Hand stated for the Second Circuit in *N. L. R. B.* v. *Peter Cailler Kohler Co.,* 130 F. 2d 503, 506,[15]

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[13] Cf. *N. L. R. B.* v. *Southern Pine Electric Coop.*, 35 L. R. R. M. 2531 (C. A. 5, February 4, 1955), enforcing 104 N. L. R. B. 834, 840–842, where the court recognized that the protection of Section 7 extended to employees who threatened to quit unless their employer met their wage demands.

[14] Cf. *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, 798, recognizing that the rights protected by Section 7

> "are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society."

Congress entrusted to the Board "the function * * * to weigh the conflicts which arise from time to time out of the exercise of those rights and to determine in each case whether the interest of the employees or the employers should be held paramount." *N. L. R. B.* v. *Illinois Tool Works*, 153 F. 2d 811, 816 (C. A. 7).

[15] Contrary to the suggestion in the Company's brief (p. 31), the *Peter Cailler Kohler* doctrine was unaffected by the 1947 amendments, and the case was cited with approval as recently as *N. L. R. B.* v. *Local Union No. 1229*, 346 U. S. 464, 475, and *Radio Officers Union* v. *N. L. R. B.*, 347 U. S. 17, 40n, as well as in the *Hoover* case, 191 F. 2d at 390.

> [many] union activities may be highly prejudicial to its employer; his customers may refuse to deal with him, he may incur the enmity of many in the community whose disfavor will bear hard upon him; but the statute forbids him by a discharge to rid himself of those who lay such burdens upon him. Congress has weighed the conflict of his interest with theirs, and has *pro tanto* shorn him of his powers.

In the instant case the record leaves no room for doubt that the MAC was created to serve a legitimate union purpose (cf. n. 9, p. 12, *supra*). Basically the MAC was conceived by the Union as a means of furthering its lawful demands, made in the course of collective bargaining, that the Company grant a wage increase. It is, of course, elementary economics that wage rates (i. e., the "price" of labor) are in large part controlled, like other prices, by the laws of supply and demand. In the instant case the Company had the advantage of the "Gentlemen's Agreement," which operated to curtail the normal mobility of the labor market and accordingly strengthened the Company in its bargaining position. The Union sought to offset this factor by increasing the number of job opportunities through the MAC. Had the MAC succeeded, the increased demand for and decreased supply of labor would have bolstered the Union's wage demands.

A second, closely related purpose of the MAC was to help the Union discover the "true market price for engineers" (*supra,* p. 5). Manifestly if other employers of engineers were paying higher wages than the Company, this fact and the precise level of those

wages would be of substantial value to the Union in its bargaining with the Company.

A third purpose of the MAC was to serve engineers who desired to leave the Company's employ by making it easier for them to get other employment. This, of course, is a most elementary form of concerted activity for mutual aid, and is the direct counterpart of the employers' "Gentlemen's Agreement." The Company argues that the Union's purpose was to make the employees dissatisfied with their jobs.[16] This contention overlooks the basic fact that, quite apart from the MAC, the normal monthly turnover in the industry was close to 3 percent, so that the Union was necessarily and properly concerned with finding jobs for those of its members who desired to move.[17] The MAC actually did not aggravate this problem, for the record shows that only 96 engineers expressed a desire to leave the Company's employ, exactly 2.7 percent of the Company's 3,500 engineers (R. 210–211, 388).

Moreover, many unions regularly operate as a sort of "employment agency," referring their members to employers who indicate a need for labor. This Court is familiar with the hiring hall practices in the build-

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[16] The Company's statement that Pearson "was making every possible effort * * * to retain *his* job" (Br., p. 33) fails to take into consideration the fact that Pearson's efforts to obtain a better job were frustrated by the "Gentlemen's Agreement." See R. 508.

[17] During the calendar year 1953, the average "quit rate" of employees in the aircraft industry was 2.7 per 100 employees per month. Bureau of Labor Statistics, United States Department of Labor, Monthly Labor Review, July 1952 to April 1953, inclusive, Table B–2 in the appendices to each issue.

ing construction and stevedoring industries.[18] In those industries a dissatisfied employee may quit his job with the knowledge that his union will refer him to another employer. Accordingly, insofar as the MAC sought to make other job opportunities available to dissatisfied employees, it was engaging in legitimate union activity.

The Company stresses the fact that the Union itself stated as a final reason for sponsoring MAC "punitive action to reduce the Engineering services available to Boeing" (R. 478). In the context of this case the term "punitive action" meant nothing more than the infliction of economic hardship on Boeing for its failure to meet competitive wage standards. If the employees had struck in support of their wage demands, this too would have been "punitive action" against Boeing; indeed the damage to Boeing would have been far greater than that resulting here. And it is no answer for Boeing to state that it could have replaced strikers, for it was equally free to replace any employee who vacated his Boeing job as a result of MAC. Moreover, the employees felt compelled by the "Gentlemen's Agreement" to restore a free labor market, and the MAC was "punitive" in the sense that it "punished" Boeing for its role in restricting employment opportunities.[19] In essence the MAC was

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[18] See, e. g., *N. L. R. B.* v. *Swinerton & Walberg*, 202 F. 2d 511, certiorari denied, 346 U. S. 814; *N. L. R. B.* v. *International Longshoremen's Union*, 210 F. 2d 581.

[19] It is not necessary to find that the "Gentlemen's Agreement" was an unlawful restraint. But cf. the order of the Federal Trade Commission in *Union Circulation Co.*, 23 Law Week 2407, citing *Anderson* v. *Shipowners Assn.*, 272 U. S. 359. It is like-

"punitive" only in the sense that it exposed the Company to competition for the services of its employees, and penalized the Company for failing to meet that competition. This "punitive action," we submit, is an inherent part of a system of private enterprise.

Finally, the Company attacks the MAC as illegal. As we have already observed, the MAC did not constitute a tort under applicable Washington law (p. 12, n. 9, *supra*). Petitioner's contention (Br. p. 36) that other Union proposals, never brought to fruition, were unlawful, sheds no light on the legality of the tactics eventually adopted by the Union. And, contrary to petitioner's suggestion (Br., p. 42), neither an employer nor a union is guilty of a refusal to bargain merely because it invokes its right to lockout or to strike in a good faith attempt to enforce legitimate economic objectives. See *Leonard* v. *N. L. R. B.,* 197 F. 2d 435, 441 (C. A. 9); *Mount Hope Finishing Co.* v. *N. L. R. B.,* 211 F. 2d 365, 371 (C. A. 4); *Brown McLaren Mfg. Co.,* 34 N. L. R. B. 984, 1005–1006.[20]

In short, the MAC existed for the lawful purpose of furthering the economic interests of the employees

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wise irrelevant that the Union may have misconceived the effect of the "Gentlemen's Agreement." Cf. *N. L. R. B.* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, 344.

[20] We do not understand petitioner's contention that the Union was acting unlawfully because it was not representing all the employees in the bargaining unit when it fostered the MAC. Participation in MAC was available to all employees, and its purpose was to better the lot of both those employees who desired to change employment and those who desired to remain in Boeing's employ.

in the bargaining unit. It involved no invasion of the employer's property or contract rights, no public disparagement of his product, no unlawful action by the employees. Insofar as it threatened to harm the employer, it did so only as a legitimate economic weapon, exposing him to the competition of other employers who paid better wages. Hence, the employees who, like Pearson, participated in the MAC were engaging in a union or concerted activity within the protection of the Act, and could not lawfully be discharged therefor.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

David P. Findling,
Associate General Counsel,
Marcel Mallet-Prevost,
Assistant General Counsel,
Frederick U. Reel,
Nancy M. Sherman,
Attorneys,
National Labor Relations Board.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

*   *   *   *   *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

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PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board.

Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under

subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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